

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA**

In re

Case No. 03-31575-WRS

Chapter 13

MARVIS EVANS,

Debtor.

Memorandum Decision

This bankruptcy case came before the Court for hearing on January 27, 2004, upon the Court's order to the Debtor to appear and show cause why the case should not be converted to a case under Chapter 7 of the Bankruptcy Code. (Doc. 23). Jerry Cruse, counsel for the Debtor, and Susan DePaola, Chapter 7 Trustee, were present for the hearing. For the reasons set forth below, the Court will order that this case be converted to a case under Chapter 7 of the Bankruptcy Code.

I. FACTS

A. Procedural Setting

The Debtor commenced this case on March 21, 2003 with the filing of a voluntary petition pursuant to Chapter 7 of the Bankruptcy Code. (Doc. 1). Susan DePaola was appointed as Trustee of the Chapter 7 case on March 27, 2003. (Doc. 6). The Trustee conducted the Section 341 meeting and subsequently filed an adversary proceeding objecting to discharge on October 8, 2003.¹ (Adv. Pro. No. 03-3129, DePaola, Trustee v. Evans). The Debtor then filed a motion to convert his case to a case under Chapter 13 on December 2, 2003. (Doc. 17). As the Bankruptcy Code generally

¹Bankruptcy Rule 4004(a) provides that complaints objecting to discharge shall be filed no later than 60 days after the Section 341 meeting. FED. R. BANKR. P. 4004(a). The Trustee previously moved to extend the deadline for the filing of complaints objecting to discharge. (Doc. 10). The Court granted the Trustee's motion and extended the complaints bar date to November 10, 2003. (Doc. 12). Therefore, the complaint was timely filed.

permits conversions, the Court granted the motion and converted the case without notice or hearing. (Doc. 18); see 11 U.S.C. § 706. However, the Trustee in the Chapter 7 case, who is the Plaintiff in the Adversary Proceeding objecting to discharge, questioned the Debtor's good faith in converting the case. Because a debtor in Chapter 13 must proceed in good faith, the Court, sua sponte, set a hearing to determine whether the conversion had been in good faith. See 11 U.S.C. § 1325(a)(3) (requiring a Chapter 13 plan to be proposed in good faith); Doc. 23 (Order to Appear and Show Cause). At the hearing, the Court also heard argument on the Debtor's ability to fund a Chapter 13 plan.

B. Facts Surrounding Conversion

Debtor's original Chapter 7 schedules show that he and his wife have a combined monthly income of \$2,530.39 and that the Debtor's monthly expenses total \$2,675.11. (Doc. 1, Schedules I & J). These figures reflect a negative cash flow in the amount of \$144.72 per month. In addition, the schedules indicate that the Debtor does not own any real property. (Doc.1, Schedule A). However, the schedules reflect that the Debtor is liable on a mortgage for real property owned by his wife.² (Doc. 1, Schedule D). The amount of the mortgage is shown as \$26,487.20 and the house is valued at \$66,250.00. (Doc. 1, Schedule D). Using these figures, it appears that there is approximately \$40,000.00 worth of equity in the property. The Chapter 7 Trustee takes the position that the Debtor has an equitable interest in one-half of the value of the home. This claim is the basis of the complaint in the related Adversary Proceeding No. 03-3129.

Subsequent to the filing of the Adversary Proceeding, the Debtor converted his case to a case

²The Debtor filed his petition in bankruptcy individually. His wife is not a joint debtor in this case.

under Chapter 13 of the Bankruptcy Code, presumably to protect any equity in the home. It is this action which the focus of the Court's concern at present. The Debtor's Motion to Convert was filed on December 2, 2003 and the Court converted the case that same day. (Docs. 18 & 19). Debtor's Chapter 13 plan, filed December 29, 2003, proposes to make monthly payments in the amount of \$290.00 to the Chapter 13 Trustee. (Doc. 25). The Debtor has not amended his schedules to indicate that there has been an increase in the monthly income or a decrease in the monthly expenses. Therefore, the Court concludes that the Debtor does not have sufficient income to fund his Chapter 13 Plan.

II. LEGAL CONCLUSIONS

Section 706 of the Bankruptcy Code governs conversion from Chapter 7 to other chapters. 11 U.S.C. § 706. Section 706(a) appears to bestow upon a debtor an absolute, one-time right to convert. 11 U.S.C. § 706(a) (stating in relevant part, "[t]he debtor may convert a case under this chapter to a case under Chapter 11, 12, or 13 of this title at any time, if the case has not been converted"). However, this right is limited by the exception found in Section 706(d), which provides that a Chapter 7 Debtor may not convert his case to a Chapter under which he is not eligible to be a debtor. 11 U.S.C. § 706(d); Gulley v. DePaola, 301 B.R. 361, 364 (M.D. Ala. 2003) (finding that the "plain language of § 706(d) requires denial of the right to convert from a Chapter 7 to a Chapter 13 plan when the debtor is ineligible to be a Chapter 13 debtor").

In the instant situation, the Court finds that the Debtor is ineligible to be a Debtor under Chapter 13. Chapter 13 proceedings are limited to "individual[s] with regular income." 11 U.S.C. § 109(e). Section 101 defines an "individual with regular income" to be an "individual whose income is sufficiently

stable and regular to enable such individual to make payments under a plan under Chapter 13.” 11 U.S.C. § 101(30). The evidence before the Court is that, at present, the Debtor’s expenses exceed his income by \$144.72 per month. (Doc. 1, Schedules I & J). He has no disposable income from which he can pay the \$290.00 per month as proposed by his Chapter 13 plan. Therefore, he does not have sufficient income to fund a Chapter 13 plan. See *In re Smith*, 234 B.R. 852, 854 (Bankr. M.D. Ga. 1999) (“The ‘regular income’ requirement of 11 U.S.C. § 109(e) anticipates that the income is sufficient to fund the debtor's living expenses and the plan payments”).

Because the Court concludes that the Debtor is ineligible to be a Debtor under Chapter 13 of the Bankruptcy Code, it does not reach the question of whether the conversion to Chapter 13 was done in good faith. The Court will enter a separate order vacating its prior order of conversion and restoring the case to one under Chapter 7 of the Bankruptcy Code. In addition, because the case will not proceed under Chapter 13, the Court will deny the Chapter 7 Trustee’s motion for payment of administrative expense.

Done this 9th day of March, 2004.

/s/ William R. Sawyer
Chief United States Bankruptcy Judge

c: Jerry L. Cruse, Attorney for Debtor
Susan S. DePaola, Chapter 7 Trustee
Curtis C. Reding, Chapter 13 Trustee